No. 89-18

In The

Supreme Court of the United States

October Term, 1989

BARBARA WINER,

Petitioner,

v.

GARY C. NIXON, PRESIDENT ACTION RENT-A-CAR AND TRUCKS, INC., T/A ACTION AUTOMOTIVE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

James E. Swiger
Thacher, Swiger & Day
3975 University Drive
Suite 450
Fairfax, Virginia 22030
(703) 385-7000
Counsel of Record for Respondents
Todd D. Bunn on Brief

QUESTION PRESENTED

I. Did the Supreme Court of Virginia err when it denied the petitioner a writ of certiorari after the trial court sustained a plea in bar on a theory of res judicata after the dismissal of a prior proceeding?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Allstar Towing, Inc. v. City of Alexandria, 231 Va. 421, 344 S.E.2d 903 (1986) 15

Bates v. Deavers, 214 Va. 667, 202 S.E.2d 217 (1774) 15

Croatan Books, Inc. v. Baliles, 583 F. Supp. 857 (1984) 15

Mammoth Mining Company v. GrandCentral Mining Company, 213 U.S. 72, 53 L. Ed. 702, 29 S. Ct. 413 (1909) 9

Mowry v. City of Virginia Beach, 198 Va. 205, 93 S.E.2d 323 (1956) 13

STATEMENT OF THE CASE

On July 26, 1986, the petitioner Barbara Winer, rented an automobile from the respondent, Action Automotive. As is customary in the industry at the time of the rental, an employee made an impression of Ms. Winer's Mastercard to secure payment. This rental transaction formed the underlying basis for a warrant in debt, Case No. 87-19648, which Ms. Winer, a California resident, filed in the general District Court of Fairfax County, Civil Division, on August 20, 1987. In the aforementioned warrant in debt, Ms. Winer sought $169.75 net of any credits, $13.00 in costs, $22.00 in postage, $20.00 in xeroxing expenses, $75.00 in attorney's fees, $2.63 in telephone expenses, $2,100.00 in time and travel expenses and $4,500.00 "punitive for bad faith" (sic) with the basis of said claim that Ms. Winer's Mastercard was billed for services

not received.

On December 9, 1987 at the conclusion of evidence presented by Ms. Winer ex parte, Judge Waters entered judgment for Ms. Winer in the amount of $150.00 plus court costs in the amount of $13.00 and interest thereon from the date of judgment.

On December 15, 1987, Action Rent-a-Car, et al., by counsel, filed a motion to vacate judgment and rehear in the general District Court of Fairfax County, Civil Division. Accompanying the aforementioned motion was a notice placing this matter on the December 21, 1987 Docket. Subsequent to a denial of the motion by the General District Court, the defendant, by counsel, noted and perfected an appeal of the decision by Judge Waters to the Circuit Court of Fairfax County on December 21, 1987. Ms. Winer was not present in the Court on December 21, 1987. This matter,

identified by Law No. 82590, was placed on the June 8, 1988 Circuit Court trial docket. Prior to the commencement of trial on June 8, 1988, Action Automotive moved for a withdrawal of the defendant's appeal. Over Ms. Winer's objection, Judge Griffith entered an order withdrawing the defendant's appeal and directing the clerk of the court to disburse the appeal bond to Ms. Winer.

On July 22, 1988, Ms. Winer filed a Motion for Judgment in the Circuit Court of Fairfax County to which the clerk of the court assigned Law No. 85911. Ms. Winer stipulates that the underlying transaction which forms the basis of Law No. 85911 is the same rental transaction which formed the underlying basis of the warrant in debt, Case No. 87-19048, which was previously filed and adjudicated in the General District Court of Fairfax County, Civil Division. The respondents

filed a plea in bar on August 12, 1988 as a responsive pleading in the aforementioned cause setting forth as the basis for said plea the doctrine of res judicata or in the alternative collateral estoppel.

The parties presented argument on the defendant's Plea in Bar before the Honorable Lewis Hall Griffith in the Circuit Court of Fairfax County, Virginia on September 9, 1988. At the conclusion of argument, Judge Griffith sustained the defendant's Plea in Bar on the basis of the doctrine of res judicata. On October 7, 1988, Judge Griffith entered an order reflecting his September 9, 1988 decision.

Ms. Winer subsequently sought review of Judge Griffith's October 7, 1988 order. On Tuesday, March 7, 1989, the Supreme Court of Virginia issued a Memorandum Opinion that there was no reversible error in the judgment complaint of, and the

Supreme Court of Virginia accordingly refused the Petition for Appeal.

Ms. Winer then petitioned the Supreme Court of Virginia for a rehearing, and for the first time during the pendency of this cause in any court, she asserted Constitutional grounds as error. By Order dated April 21, 1989, the Supreme Court of Virginia denied the Petition for Rehearing.

Ms. Winer subsequently moved the Supreme Court of Virginia to defer the mandate in this cause while the case is on appeal to the United States Supreme Court. By Order dated June 7, 1989, the Supreme Court of Virginia ordered that the issuance of the mandate in this cause to be deferred to and including the 20th day of July, 1989.

BEST AVAILABLE COPY

SUMMARY OF ARGUMENT

A petition for writ of certiorari of petitioner Barbara Winer should be dismissed for the petitioner failed to preserve a substantial question involving United States Constitution. The first time Ms. Winer asserted any Constitutional error was in petition for rehearing to the Virginia Supreme Court. At no time prior to that had Ms. Winer made any assertion of the United States Constitution during the pendency of this underlying decision of the Circuit Court of Fairfax County, Virginia and the subsequent affirmation of that decision by the Supreme Court of Virginia presents no issues involving any substantial question of Federal Law.

Notwithstanding the foregoing, the decision of the General District Court became a final adjudication of the rights

of the parties regarding all matters plead upon the withdrawal of the defendant's appeal prior to the commencement of the June 8, 1988 trial. A re-litigation of matters plead in the action that was subsequently filed an labeled Law No. 85911 is precluded and the decision of the trial court with regard to the defendant's plea and bar should be affirmed.

ARGUMENT

I. THIS CAUSE LACKS A SUBSTANTIAL QUESTION UPON WHICH TO BASIS AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES, AND FOR THAT REASON PETITION FOR WRIT OF CERTIORARI FILED HEREIN SHOULD BE DENIED.

It is well settled that the Supreme Court of the United States will dismiss an appeal where it appears to the Supreme Court that the proceeding from the State Court turns on a question of fact determined by the state court or on a question solely involving state law, and does not turn on any federal question of law. *Mammoth Mining Company v. Grand Central Mining Company* (1909) 213 U.S. 72, 53 L. Ed. 702, 29 S. Ct. 413.

In this particular cause, Ms. Winer failed to allege any Constitutional error until she petitioned the Supreme Court of Virginia for rehearing. Ms. Winer, simply, failed to properly preserve any Constitutional claims that she may have

had.

Notwithstanding the foregoing, Ms. Winer has not alleged a colorable claim. She has failed to allege any specific injury in regard to the application of the laws of the Commonwealth of Virginia to her. It is well settled that a mere generalized grievance is insufficient. There is simply no error involving the Fourteenth Amendment of the United States Constitution, the First Amendment of the United States Constitution and Article Four, Clause Two of the United States Constitution as alleged by Ms. Winer in her petition for writ of certiorari.

II. **THE DECISION OF THE GENERAL DISTRICT COURT BECAME A FINAL ADJUDICATION OF THE RIGHTS OF THE PARTIES REGARDING ALL MATTERS PLED WHEN THE DEFENDANT'S WITHDREW THEIR APPEAL PRIOR TO THE COMMENCEMENT OF THE JUNE 8, 1988 TRIAL.**

The petitioner erroneously assumes that with the withdrawal of the appeal in the Circuit Court in the first litigation that she has a continuing cause of action. Ms. Winer did not appeal Judge Griffith's June 8, 1988 Order wherein he granted the defendant's Motion to Withdraw the appending appeal. With the withdrawal of the appeal, the decision of the General District Court becomes a final judgment with regard to all matters plead. The warrant in debt filed in the first litigation clearly and unambiguously pleads a prayer for damages including $169.75 net of any credits, $13.00 costs, $22.00 postage, $20.00 xerox, $75.00 attorney's fee, $2.63 phone, $2,100.00

time and travel and $4,500.00 in punitive damages for bad faith with the underlying basis of her claim that her Mastercard was billed for services not received. Judge Water's decision of December 9, 1987 is a full and final adjudication of all matters plead.

III. THE RE-LITIGATION OF MATTERS PLEAD IN LAW NO. 85911 IS PRECLUDED AND THE DECISION OF THE TRIAL COURT WITH REGARD TO THE DEFENDANT'S PLEA IN BAR SHOULD BE AFFIRMED.

It is well settled in the Commonwealth that the doctrine of res judicata is based upon the theory that "one person shall not the second time litigate, with the same person . . . the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined upon the merits by a court of competent jurisdiction, in a judgment in personam in a former suit." *Mowry v. City of Virginia Beach*, 198 Va. 205, 211, 93 S.E.2d 323 (1956). To establish a plea of res judicata it is necessary to show an identity of the parties, an identity of the quality of the parties, and identity of the cause of action, and identity of the remedy. id. It is undisputed that there is an identity

of parties, and identity of the quality parties between the first and second litigation. In each claim, Ms. Winer is the plaintiff and the burden of proof with regard to each and every element plead, while Mr. Nixon and Action Rent-a-Car and Trucks, Inc. t/a Action Rent-a-Car, are defendants in both claims.

In reviewing the complaint filed in the second litigation it is readily apparent that the remedies sought in both causes are identical. The identical underlying transaction has yielded two suits both seeking monetary damages based on essentially the same criteria. Therefore, there is an identity of remedies between the first and second litigation.

A cause of action may be defined as "an assertion of particular legal rights which have arisen out of a definable factual transaction." *Allstar Towing, Inc.*

v. City of Alexandria, 231 Va. 421, 425, 344 S.E.2d 903, 906 (1986), citing *Bates* v. Devers, 214 Va. 667, 672 n8. 202 S.E. 2d. 917, 921, n.8. (1974). Res judicata bars the re-litigation of the same cause of action, or any part which could have been litigated between the same parties. *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d. 917 (1974). Res judicata precludes the re-litigation of a claim even when the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action. *Croatan Books, Inc. v. Baliles*, 583 F. Supp. 857, 861 (1984).

Even assuming arguendo that Ms. Winer's first claim sounds in contract, she cannot overlook the fact that her second claim, which sounds in tort, requires the same evidence as the first to prove the claim. Ms. Winer's second claim

is merely a different theory of recovery from her first claim and both claims are based on the identical underlying transaction or occurrence. Therefore, there is an identity of cause of action between the first litigation and the second litigation.

IV. **WINER IS ESTOPPED FROM CLAIMING THAT HER CAUSE HAS NOT BEEN LITIGATED ON THE MERITS. MS. WINER APPEARED IN COURT ON DECEMBER 9, 1987 AND PRESENTED PROOF OF HER DAMAGES EX PARTE.**

At the conclusion of the presentation of her evidence, Judge Waters entered judgment for the plaintiff in the amount of $150.00 plus court costs in the amount of $13.00 and interest thereon from the date of judgment. Assuming arguendo that Ms. Winer failed to present evidence within regard to each of the items enumerated on the Warrant in debt filed in the first claim, she nonetheless had the opportunity to present evidence. If for whatever reason she failed to sustain her burden of proof with regard to said items, she is now precluded from attempting to prove her damages on a second occasion. Therefore, she had her day in court to litigate her damages and she is estopped from claiming that her cause has not been

litigated on the merits.

BEST AVAILABLE COPY

CONCLUSION

The petitioner has failed to set forth any compelling reasons for this court to grant a writ of certiorari and review this case in full. This cause lacks a substantial question for the Supreme Court of the United States to review.

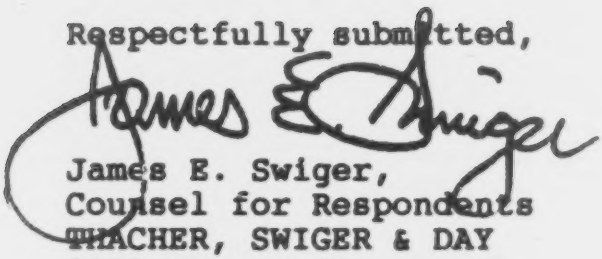
Notwithstanding the foregoing, it is readily apparent upon a review of the facts and decisions of the courts below that this cause has previously been properly adjudicated. Accordingly its dismissal was proper. For the reasons expressed herein

Nixon, Pres

Trucks, I Aut

respectfully request that this court affirm the action of the Supreme Court of Virginia and the Circuit Court of Fairfax County, Virginia and deny the petitioner's request.

Respectfully submitted,



James E. Swiger,
Counsel for Respondents
THACHER, SWIGER & DAY
3975 University Avenue
Suite 450
Fairfax, Virginia 22030
(703) 385-7000
Todd D. Bunn on Brief